There was no suggestion that the contents of this statement, as opposed to the fact that it was made, is inadmissible. That it is admissible for such purpose there can be no doubt. In *Sarkar* on Evidence, 12th Edition at page 191 appears the following passage:

"The declarations, admissions and acts of agents are admissible against their principals on grounds very similar to those which govern the declaration of co-partners. The principal constitutes the agent as his representative in the transaction of certain business. Whatever, therefore, the agent does in the lawful prosecution of that business, is the act of the principal. The rule is one of substantive law and not evidence. It is founded on the legal identity of interest subsisting between the parties. They are original evidence and not hearsay; and being regarded as verbal acts they are receivable in evidence without calling the agent himself to prove them. [*Doe* v. *Hawkins* 1841, 2 QB 212]."

I would with respect say that this is a classical instance where a court may presume that anything else Mr. Kirby might have to say about how long Brex may be left in the system would be unfavourable to the appellants' case.

Should the trial judge have drawn an adverse inference from the fact that Kellaway's report was not produced?

At page 248 of his judgment, his Lordship remarked "In this connection, I refer to the application by counsel for the defendants for the production by the plaintiffs of the report of Kellaway of the I.A.C. It was learned counsel's contention that the time of his making the request when his own witness (DW4) was giving evidence was the right and proper moment. Production was objected to on the ground of privilege. Kellaway was not a party to the action and I had no evidence that he was an expert. I upheld the objection but there was an earlier report of Kellaway which was in the possession of the defence, and which being a near contemporaneous document was perhaps the more pertinent."

Kellaway made two reports. The first of these, a copy of which is in the possession of the appellants. It is the 2nd report, the non-production of which by respondents, counsel for appellants submits, justify the operation of the presumption under section 114(g) of the Evidence Act against them. In respect of this report, the respondents have filed an affidavit at the trial stating that it had been called into existence for the purpose of litigation, and was therefore privileged. That this report is privileged there can be no doubt. (See Phipson on Evidence — 10th Edition paragraph 604).

I am of the view that this appeal should be dismissed with costs.

Gill C.J. (Malaya) and **Ali F.J.** concurred.

Appeal dismissed.

Solicitors: *Skrine & Co.; Lim Kean Siew & Co.*

OOI AH PHUA v. OFFICER-IN-CHARGE CRIMINAL INVESTIGATION, KEDAH/PERLIS

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) & Wan Suleiman F.J.) June 2, 1975]

[Alor Star — Federal Court Civil Appeal No. 14 of 1975]

Administrative Law — Habeas Corpus — Arrest by police — Refusal to allow solicitor to see person arrested — Right to counsel — Whether denial renders detention unlawful — Criminal Procedure Code (F.M.S. Cap. 6), ss. 255, 365 — Federal Constitution, art. 5(3).

Constitutional Law — Fundamental liberty — Right to counsel — Federal Constitution, art. 5(3).

Habeas Corpus — Arrest by police — Refusal to allow solicitor to see person arrested.

This was an appeal from the decision of Hashim Yeop A. Sani J. (reported in [1975] 1 M.L.J. 93) dismissing an application for a writ of *habeas corpus*. The facts in this case were that the subject had been arrested by the police on December 26, 1974 and after being produced before the magistrate on December 28, 1974 he was formally charged on January 7, 1975 for abetment in armed robbery. The appellant, the father of the subject, instructed solicitors and counsel attempted to see the subject but was unsuccessful. Subsequently, the appellant applied for a writ of *habeas corpus* and it was alleged that (1) the right of the subject to consult and be defended by counsel of his choice commenced immediately after his arrest; (2) this right is an unqualified right and the denial of this right by the police had rendered the detention unlawful. The application having been dismissed in the High Court, the appellant appealed to the Federal Court.

Held, dismissing the appeal: (1) the right of an arrested person to consult his lawyer begins from the moment of arrest but that right cannot be exercised immediately after arrest. A balance has to be struck between the right of the arrested person to consult his lawyers on the one hand and on the other the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence exists against them. The right should not be exercised to the detriment of any investigation by the police;

(2) in any event *habeas corpus* was not the correct remedy in this case as the only complaint was that after the arrest of the subject, his solicitor was denied access to him.

Cases referred to:-

(1) *Moti Bai* v. *The State* A.I.R. 1954 Rajasthan 241.

(2) *Ramli bin Salleh* v. *Inspector Yahya bin Hashim* [1973] 1 M.L.J. 54.

(3) *Sundar Singh* v. *Emperor* A.I.R. 1930 Lahore 945.

(4) *Lee Mau Seng* v. *Minister for Home Affairs, Singapore & Anor.* [1971] 2 M.L.J. 137.

(5) *Re Madhu Limaye* A.I.R. 1969 S.C. 1014.

(6) *Public Prosecutor* v. *Mah Chuen Lim & Ors.* [1975] 1 M.L.J. 95.

FEDERAL COURT.

Karpal Singh for the appellant.

Lamin bin Haji Yunos (Federal Counsel) for the respondent.

Suffian L.P.: On December 26, 1974, at about 11.30 a.m. an armed robbery was committed by certain persons at the office of the Kubang Pasu Transport Co. at Jalan Tunku Ibrahim at Alor Star. Apparently the Police had advance information of the robbery and they were lying in ambush near the scene. Soon after the robbery had started they exchanged fire with the robbers, during which one of the robbers was shot dead and another injured and captured. Later the same day Inspector Amiruddin arrested Ooi Chooi Toh aged 25 on suspicion of having been the person who stood guard downstairs during the robbery. He was arrested about 50 yards from the scene of the crime.

The 26th of December was a Thursday, a half day in Kedah, while Friday the 27th was the usual weekly holiday. On the first working day after that Kedah week-end Saturday 28th December, the Inspector produced Ooi before a magistrate and applied under section 117 of the Criminal Procedure Code for authority to detain Ooi in policy custody for a week until January 3, 1975. The magistrate was satisfied that police investigation could not be completed within 24 hours and granted the application.

Ooi's father the applicant (appellant before us) instructed solicitor Mr. Karpal Singh on Monday, 30th December. On the same day Mr. Karpal Singh wrote a letter to the O.C.C.I., Kedah (respondent in the court below and here), asking for permission to see Ooi at 12.30 p.m. that day so that he could take instructions. That very day one Mr. Gopal writing on behalf of the Kedah C.P.O. wrote in reply, not denying Mr. Karpal Singh access to Ooi but merely regretting that the time and date given by Mr. Karpal Singh were not suitable and saying that, if Mr. Karpal Singh wished to see Ooi at any other date and time, he was to get in touch with the O.C.P.D., Alor Star.

Apparently Mr. Karpal Singh had an interview with the Police during which he was told that investigations were still in progress and that it might be possible for him to see Ooi on January 2, 1975, but Mr. Karpal Singh was unable to see him that day despite calling several times at the police station.

According to Acting D.S.P. Haji Junid bin A. Aziz, Deputy O.C.C.I., on that day (the 2nd, another Thursday, a half day) Ooi led the police to certain places in connection with other reports and did not get back to the station until 3 p.m.

On 5th January Ooi's father (the applicant) filed notice of motion in the Alor Star High Court applying for a writ of *habeas corpus* to issue directed to the O.C.C.I. to have Ooi's body brought before the court. The application was made under clause (2) of article 5 of the Constitution and also under the Criminal Procedure Code. In his supporting affidavit the father maintained that his son's continued detention was unlawful because of the O.C.C.I.'s refusal or failure to allow Mr. Karpal Singh to see the son for consultation as guaranteed by article 5(3) of the Constitution.

The motion was heard on 9th January before Hashim Yeop A. Sani J. who in a judgment which has been reported (see [1975] 1 M.L.J. 93) dismissed it. The applicant appeals to us.

The issue here is (according to Mr. Karpal Singh): when does the right of an arrested person to consult and be defended by a legal practitioner of his choice, accrue? Mr. Karpal Singh contends that it accrues at the moment of arrest. He asks this court to give a ruling that will meet *all* cases. During the course of arguments we told him that it would be undesirable and very difficult for this court to give such a ruling and that we would prefer to answer a specific question. Under pressure from us he then narrowed down the issue by contending that on 30th December itself (that is on the day he was first retained by Ooi's father) Ooi had the right to consult him (Mr. Karpal Singh), and that as Ooi was denied that right his detention was unconstitutional, void, and that this court should order Ooi's release, despite the fact that a preliminary enquiry against Ooi was due to begin on the day immediately following arguments in this appeal.

With all due respect, I do not think that there is any merit in this appeal.

Section 365 of the F.M.S. Criminal Procedure Code as in so far as material reads:

"The High Court may whenever it thinks fits direct —

(1) that any person who

(a) ...

(b) is alleged to be illegally or improperly detained in public or private custody within the limits of the Federation,

(c) ...

be set at liberty; ..."

Section 255 of the Criminal Procedure Code provides:

"Subject to the provisions of section 8, and to any express provision of law to the contrary, every person accused before any Criminal Court may of right be defended by an advocate."

Article 5 of the Constitution provides:

"(1) No person shall be deprived of his life or personal liberty save in accordance with law.

(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority.

(5) Clauses (3) and (4) do not apply to an enemy alien."

The corresponding provision of the Indian constitution is article 22(1) which reads:

"No person who is arrested shall be detained in custody without being informed, as soon as may be, of the ground for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

That article came up for consideration by Modi J. in *Moti Bai* v. *the State*[1] where the facts were as follows. Mt. Moti Bai was arrested by the police on June 15, 1954, on suspicion of being involved in an offence under section 6 of the Indian Wireless Telegraphy Act and under section 489A of the Penal Code. While she was in police custody her counsel wanted to interview her. This interview was not granted although he was able to obtain one at the house of a magistrate where the accused was taken to for remand under section 167 of the Indian Criminal Procedure Code (corresponding to our section 117). Counsel wanted another interview on the 17th and he applied to the Station House Officer, who turned down the application. Counsel then applied to a senior officer, a Deputy Superintendent, who said yes, but that the interview would be in the presence and within the hearing of the police.

Modi J. ruled that in India the right of an arrested person to consult a legal practitioner of his

choice began right from the day of his arrest. He said at page 242:

"The requirement is that no such person shall be detained without being informed at the earliest possible opportunity of the ground for his arrest and that such person shall have a right to consult and to be defended by a legal practitioner of his own choice. In order that this right 'to consult a legal practitioner of one's choice' can properly and reasonably be given effect to, it must follow that such legal practitioner must be allowed the facility to consult the accused whom he seeks to defend, and I may further point out that if such consultation is to be useful, it must be allowed without the hearing of the police though in their presence. The presence of the police is obviously needed so that the accused may not abscond from custody or do anything which may be objectionable otherwise. It deserves to be noticed in this connection that the right of the accused enshrined in this Article begins right from the day of his arrest."

Syed Agil Barakbah J. in *Ramli bin Salleh* v. *Inspector Yahya bin Hashim*[2] considered *Moti Bai*[1] and a few other authorities and stated his conclusions as follows:

"In the light of the authorities cited above, I am of the opinion that the right of an accused person remanded in police custody, to consult and be defended by a legal practitioner of his own choice as embodied in clause (3) of article 5 of the Constitution begins right from the day of his arrest even though police investigation has not yet been completed. On the other hand, the law also requires the police to carry out investigations in order to satisfy the constitutional requirement of clause (1) of article 5 with a view to bringing offenders to justice. It is in that respect and towards that end that the fundamental right of the accused to consult counsel of his own choice should be subject to certain legitimate restrictions which necessarily arise in the course of police investigation, the main object being to ensure a proper and speedy trial in the court of law. Such restrictions may relate to time and convenience of both the police and the person seeking the interview. They should not therefore be subject to any abuse by either party, for instance, by the police in unreasonably delaying the interview or by counsel in demanding an interview at any time that suits him or by interference with investigation."

With respect I agree that the right of an arrested person to consult his lawyer begins from the moment of arrest, but I am of the opinion that that right cannot be exercised immediately after arrest. A balance has to be struck between the right of the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence exists against them. The interest of justice is as important as the interest of arrested persons and it is well-known that criminal elements are deterred most of all by the certainty of detection, arrest and punishment.

With respect I agree with the view of Bhide J. in *Sundar Singh* v. *Emperor*[3] who said at page 947:

"The right of a prisoner to have access to legal advice must of course be subject to such legitimate restrictions as may be necessary in the interests of justice in order to prevent any undue interference with the course of investigation. For instance a legal adviser cannot claim to have interviews with a prisoner at any time he chooses. Similarly, although ordinarily a member of the Bar may be presumed to understand his responsibility in the matter, if there are any good reasons to believe that a particular pleader has abused or is likely to abuse the privilege, that pleader may be refused an interview. But, in such cases the police must of course be prepared to support their action on substantial grounds."

With respect I agree with the view of the learned judge from whose decision this appeal has been lodged, when he said at page 94:

"To begin with it should be noted that Article 5(3) of our Constitution does not introduce an entirely new right but merely re-states a right which had existed in some form before the Constitution. Section 255 of the Criminal Procedure Code (F.M.S. Cap. 6) and section 250 of the Criminal Procedure Code (S.S. Cap. 21) already granted to every person accused before any criminal court the right to be defended by an advocate. Article 5(3) of our Constitution now guarantees this right and at the same time has converted it into a constitutional provision. The equivalent provision is found in Article 22(1) of the Indian Constitution which although stated in negative terms has the same effect as our Article 5(3). The right to consult counsel under Article 22(1) of the Indian Constitution was first mooted in the case of *Moti Bai* v. *State*[1] where Modi J. in his judgment observed that the right of an accused person to consult counsel began since his arrest 'though subject to reasonable restrictions as to time and convenience.' These 'restrictions 'were also recognised by Wee Chong Jin C.J. in *Lee Mau Seng* v. *Minister for Home Affairs, Singapore & Anor.*[4] where the learned Chief Justice expressed an *obiter dicta* that an arrested person is [under article 5(3)] 'beyond a shadow of doubt entitled to this constitutional right granted to him by the authority who has custody of him after his arrest and this right must be granted to him within a reasonable time after his arrest'. That the right to counsel should be allowed within a reasonable time after the arrest was also recognised in the 'guidelines' of Syed Agil Barakbah J. in *Ramli bin Salleh* v. *Inspector Yahaya bin Hashim.*[2]

To get the correct perspective of Article 5(3) of our Constitution it is important that that clause should be divided into two limbs, *i.e.*, the right of a person arrested to be informed of the ground of his arrest, and the right of a person arrested to consult and be defended by a counsel of his choice. With regard to the first limb the person arrested has a right to be informed 'as soon as may be' of the grounds of his arrest which means he should be informed as soon as possible or in the shortest practicable time of the grounds of his arrest. It is seen that although the second limb gives the person arrested the right to consult and be defended by counsel of his choice that clause does not direct the time when this right begins. This is significant because the phrase 'as soon as may be' denotes that the right operates forthwith and that the authorities making the arrest shall as soon as possible inform the person the grounds of his arrest. Having regard to the history of Article 5(3) of our Constitution, which is in my view to crystalise into a constitutional provision an already existing right under section 255 of the F.M.S. Criminal Procedure Code and section 250 of the S.S. Criminal Procedure Code (*i.e.* a right to be defended by an advocate), the true meaning of Article 5(3) becomes clear. In this connection the judgment of Grover J. in *Re Mahdu Limaye*[5] is in my opinion relevant. In the course of his judgment Grover J. said of Article 22(1) of the Indian Constitution as follows:—

'The two requirements of clause (1) of Article 22 are meant to afford the earliest opportunity to the arrested person to remove any mistake, misapprehension or misunderstanding in the minds of the arresting authority and, also to know exactly what the accusation against him is so that he can exercise the second right, namely, of consulting a legal practitioner of his choice and to be defended by him.'

Like Article 22(1) of the Indian Constitution our Article 5(3) embodies a rule which should be regarded as vital and fundamental for safeguarding personal liberty under rule of law. It is true that the right under the second limb of Article 5(3) does not operate only when he is charged in a criminal court but certainly well before that so as to enable him to prepare his defence. But it cannot certainly be said to operate in all cases simultaneously with the right in the first limb of the clause to be informed of the grounds of his arrest. Such a construction would deprive that clause of its true meaning and purpose. In other words the right of the person under the second limb of that clause should be reconciled with the duty of the police to investigate into an offence under the Criminal Procedure Code so that a proper investigation, and consequently an expeditious trial, can be made possible. A speedy trial is certainly an unwritten right of every person accused of an offence. The right of the person under the second limb of that clause should not be exercised to the detriment of investigation. The authorities concerned must however exercise their discretion in good faith to enable the person arrested to exercise his right under that clause. Since

the end of justice is justice and the spirit of justice is fairness then each side should have equal opportunity to prepare its own case fully, freely and fairly before the court. To say differently, to succeed the applicant in a case of this nature must show bad faith on the part of the authorities in denying the exercise of the right of the person arrested, that is. he must show that there is on the part of the authorities a clear and deliberate attempt to obstruct or hinder the person arrested from getting the benefit of counsel to prepare his defence. Each case will therefore be considered on its own merits."

Article 5(3) was also considered in *Public Prosecutor* v. *Mah Chuen Lim and Others*[6] and with respect I agree with Syed Othman J. when he said at page 96:

"The Constitution does not prescribe the time within which the arrested person shall be allowed to consult counsel. But section 38 of the Interpretation and General Clauses Ordinance, 1948, which applies to the Constitution (see Eleventh Schedule) reads:

When no time is prescribed or allowed within which anything shall be done, such thing shall be done with all convenient speed and as often as the prescribed occasion arises.'

(A similar provision can be found in section 54(2) of the Interpretation Act, 1967, which applies to legislation set out in section 2).

What is 'convenient speed' would depend on the circumstances of each particular case. I do not think it is desirable to lay down the speed convenient to all cases."

In view of the above, I am of the opinion that it was unreasonable of Mr. Karpal Singh to expect to be allowed to interview Ooi on Monday, December 30, 1974, and that as in this case there had been a daylight robbery committed in the heart of the state capital involving the use of a pistol and the loss of $14,000 to $15,000 not to mention the loss of one life and that as many young men are prepared to go to any length in the pursuit of instant wealth armed robberies are therefore quite common, it was quite reasonable of the police to give facilities to Mr. Karpal Singh to interview Ooi for the first time only on January 5, 1975.

It should be added that two days later Ooi was charged in the Magistrate's Court under sections 392 and 397 of the Penal Code and that, as already stated, the preliminary enquiry into this offence had been fixed to begin on the day following arguments in this appeal.

So much therefore regarding the issue as framed by Mr. Karpal Singh. But with all due respect, I do not think that that is the real issue before the learned judge and before us. This being an application under section 365 of the Criminal Procedure Code and under article 5(2) of the Constitution, with respect I agree with Encik Lamin for the respondent that the real issue is a simple one, namely this, whether or not Ooi was lawfully detained. If so, the court should not release him; if not, the court should release him. As to this the affidavit evidence is very clear. There was an armed robbery, a seizable offence, and there was a reasonable suspicion that Ooi was concerned in that offence, and Inspector Amiruddin not only had power to arrest him without a warrant (section 23(i)(a) of the Criminal Procedure Code), he was also under a duty to do so. By the time this application was filed on January 5, 1975, Ooi had been detained by order of a magistrate, and so there was no question of his detention being unlawful.

In any event I do not think that *habeas corpus* is the right remedy for the applicant if his only complaint is that after his son Ooi's arrest his solicitor was denied immediate access to Ooi. The juxtaposition of clauses (2) and (3) of article 5 does not mean that a person who is denied immediate access to his lawyer has his remedy by way of *habeas corpus*, for it is possible for a person to be lawfully detained and yet unlawfully denied communication with his lawyer. With respect I agree with the learned Chief Justice of Singapore in *Lee Mau Seng*[4] when he said at page 141:

"In my judgment *habeas corpus* is not an available remedy to a person who, after his arrest by the police and under lawful detention by the police ... has been refused by the police to be allowed his constitutional right under article 5(3) of the Constitution to be allowed to consult a legal practitioner of his choice. Such a person must seek other available remedies...."

In the event I would therefore dismiss this appeal.

Lee Hun Hoe C.J. (Borneo) and **Wan Suleiman F.J.** concurred.

Appeal dismissed.

Solicitors: *Karpal Singh, Wong & Co.*

GANESAN v. KALIMA

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) & Wan Suleiman F.J.) June 6, 1975]

[Alor Star — Federal Court Civil Appeal No. 151 of 1974]

Contract — Loan of money with interest — Plaintiff unlicensed moneylender — Whether money claimed is tontine money — Questions of fact — Appeal Court should not disturb findings of fact.

The appellant had brought a claim for $2,000, which he alleged he lent to the respondent. The learned magistrate dismissed the claim as he held: (1) the $2,000 was a loan with interest included and as such unenforceable because the appellant was an unlicensed moneylender; (2) the money claimed was tontine money and therefore not recoverable. The appellant's appeal to the High Court was dismissed and he appealed to the Federal Court.

Held, dismissing the appeal: it would not be right for the court which did not have the advantage of seeing and hearing the witnesses to disturb the findings of fact by the learned magistrate.

Cases referred to:-

(1) *S.M. Ameer Batcha* v. *V.K. Kunjumon* [1959] M.L.J. 59.

(2) *Tan Chow Soo* v. *Ratna Ammal* [1969] 2 M.L.J. 49 @ 50.

The following cases were also cited in argument: *Tay Kheng Hong* v. *Heap Moh Steamship Co. Ltd.* [1964] M.L.J. 87, 92; *Chellapah* v. *Official Assignee* [1971] 1 M.L.J. 24 F.C.; *Baju Rai* v. *Liau Kim Lian* [1965] 1 M.L.J. 128, 192, F.C.; *Chow Yoong Hong* v. *Choong Fah Rubber Manufactory* [1962] M.L.J. 74, 77; *Kannappa Chettiar* v. *Scully & Anor.* [1962] M.L.J. 148; *Chellapah Rasadurai* v. *Selvadurai* [1971] 2 M.L.J. 170.

FEDERAL COURT.

A. Jayadeva for the appellant.

Natha Singh for the respondent.

Suffian L.P.: At the outset I would like to say that Wan Suleiman F.J. concurs with both judgments about to be delivered.